

**Kenneth D. Peterson**

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**From:** Mark Noennig <Mark@henwlaw.com>  
**Sent:** Saturday, February 12, 2011 5:15 PM  
**To:** Kenneth D. Peterson  
**Subject:** RE: HB 425

Ken:

Thank you for advising me about the hearing on HB 425 on February 15. Unfortunately I am in trial beginning Monday, February 14 through February 16 in Bozeman, and will not be able to testify on February 15. I would appreciate it if you would tell the committee members the following (and you may provide a copy of this email if you choose).

My name is Mark Noennig. I strongly support HB 425. For over 32 years I have practiced real estate and commercial law in Billings, and served as a member of the House from 1999 to 2005, where I was a member of the House Judiciary Committee.

I introduced and carried the bill that became 25-7-105, MCA. It has been very useful for its intended purpose, to encourage parties to settle lawsuits. Either party may make an offer of settlement and the other party will risk paying the offering party's attorney fees from then on if the offer is not accepted and that party does not get a better outcome at trial. It applies in those cases where the winner would otherwise have no right to recover attorney fees and in cases where there is a contract or statute allowing the award of fees.

I have experienced the statute working very well. Here are two examples in cases I handled:

1. My client was a woman who shared title to her rural property with her fiancé, each contributing to the down payment. But he left without paying his share of the expenses or improvements and sued for the return of his down payment. We calculated the amount he was entitled to based on his down payment less his share of contribution and offered it under the statute. He accepted within 10 days.
2. My client wanted to move an old fence that a survey showed was over his boundary line, and intended to put a new one on the correct boundary line, but the three neighbors refused. He sued all three without an attorney. When I began representing him, at my suggestion he made an offer of settlement based on the neighbors removing the fence without his asking for any damage payment for trespass, etc. One who was represented by counsel accepted within the 10 days. The other two declined but later on advice of counsel, recognizing they would lose and facing payment of our client's attorney fees, they agree to remove the fence and dismiss the case.

The original bill was based on a similar provision in Rule 68, Montana Rules of Civil Procedure, providing for an offer of judgment and allowing costs only, and not fees, if not accepted. Rule 68 offers can be made upon filing of the complaint. The provisions of the original bill were amended to change the time periods. It requires more time to pass after the filing of the complaint and requires the offer to be made farther in advance of trial, apparently because of some concern that there would not be sufficient information available to evaluate an offer until after 60 days, and 30 days was needed to resolve the matter well before trial. I have found that the initial time limit can hinder quick resolution of a case. The offer is not usually made until information is available, but that information is often available immediately upon filing. Waiting for 60 days simply increases the cost of litigation and provides no real benefit. And there is no reason to limit offers close to trial. Cases can be settled at any time and parties should always be encouraged to settle. So The statute should be amended to allow immediate offers and to extend the time up to 10 days before trial, the same times as allowed in Rule 68. More cases will settle more quickly, reducing attorney fees, costs, inconvenience, risk and expense of litigation.

Please feel free to contact me with any questions. Thank you.

Mark Noennig

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